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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1609

INTERNATIONAL PAPER COMPANY,
Petitioner,

vs.

STATE OF MISSISSIPPI, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF FOR RESPONDENTS IN OPPOSITION

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No. 72-1609

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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OPINIONS BELOW

The opinion of the Chancery Court of Jackson County, Mississippi is unreported, annexed as Appendix "A", page A1 hereof.

JURISDICTION

The jurisdictional statement of the petitioner discloses no basis for the issuance of the writ, under 28 USCA Section 1257 (3) and Supreme Court Rule 19 (a). Respondents' objections are fully set out in the Argument.

STATUTORY PROVISIONS

Chapter 17, Laws of the State of Mississippi of 1884 appears as Appendix "B", page A4 hereof.

Section 4142 of the Mississippi Code of 1942 appears as Appendix "C", page A6 hereof.

STATEMENT OF CASE

Under Mississippi law exhibits to a complaint control over the allegations made in the complaint. (*Williams* v. *Wilson*, 129 So. 2d 125 (Miss 1961)) The exhibits omitted from the amended complaint, Appendix "F", page A23 of the petition, are as follows:

(a) Petitioner's deraignment of title (Exhibit I)

(b) The official U. S. Government Survey (Exhibit II)

(c) The report of J. M. T. Hamilton, Surveyor (Exhibit III)

(d) The official plat of the Hamilton survey (Exhibit IV)

These exhibits are referred to both in the trial court's opinion, Appendix "A", page A1 hereof, and in the controlling opinion of the Mississippi Supreme Court, Appendix "A", page A1 of the petition.

The "Lowry Island" area surveyed by Mr. J. M. T. Hamilton consisted of approximately twenty square miles of the Bay of Pascagoula on the Mississippi Sound. Mr. Hamilton, in making his "survey" by boat, divided the entire Bay of Pascagoula between the East and West prongs

of the Pascagoula River into "lots" of approximately 40 acres each. These "lots" indiscriminately included navigable waters, bayous, water bottoms, and tidal marshlands. No fast lands were delineated on the survey.

The area surveyed included more than twenty thousand acres of the Bay of Pascagoula, approximately five thousand acres of which are claimed by petitioner. These "lots" were sold by the State Land Commissioner between 1894 and 1917 to land speculators for prices varying between fifty cents and $1.25 an acre. This area, as pointed out in the controlling opinion of the Mississippi Supreme Court, "does not lend itself to the normal characteristics of possession inasmuch as it is marsh and swampland." There was no allegation in the amended complaint that the petitioner or its predecessors in title have taken physical possession of these tidal areas, had erected any improvements of any type, kind or description thereon, or had made any public use of such tidal areas. Petitioner acquired its claimed title to these tidal areas in 1967, knowing that the State of Mississippi was contending that the basic patents were void.

Neither the petitioner nor its predecessors in title have sought to obtain repayment from the State for the purchase price of the State patents, taxes paid thereon and interest at the rate of six percent per annum, under Section 4142, Mississippi Code of 1942 (Appendix "C", page A6 hereof).

ARGUMENT

1. The Petition for Certiorari Was Not Timely Filed.

The judgment of the Mississippi Supreme Court affirming the decree of the trial court was rendered on July 3, 1972. Petition for rehearing was filed by the petitioner and overruled by the Mississippi Supreme Court on January 2, 1973. The filing of the petition for rehearing suspended the court's final judgment until January 2, 1973 when the petition for rehearing was disposed of. *Burton* v. *Redmond*, 71 So. 2d 772 (Miss 1954).

The subsequent filing of petitioner's motion for leave to file a motion to arrest and vacate the Mississippi Supreme Court's judgment did not further suspend the finality of the Court's denial of the petition for rehearing on January 2, 1973. *Deckker* v. *Bryan Bros. Packing Co.*, 162 So. 2d 648 (Miss 1964).

No order was entered by the Mississippi Supreme Court staying its final judgment. Both its judgment of July 3, 1972 and the denial of the petition for rehearing on January 2, 1973 were officially reported prior to its overruling the motion to arrest judgment. *International Paper Company of Moss Point, Mississippi* v. *Mississippi State Highway Department*, 271 So. 2d 395. Appendix "A", page A1 of the petition.

Petitioner neither requested nor was granted an extension of time by the Mississippi Supreme Court within which to apply to this Court for certiorari. The petitioner did not make an application for extension of time to this Court or to any Justice thereof.

Under these facts the filing of the petition for certiorari on May 31, 1973 did not vest jurisdiction in this Court.

Title 28, § 1257 (3). *Gypsy Oil Co.* v. *Escol*, 48 S. Ct. 112, 275 U.S. 498, 72 L. Ed. 393. *Citizens Bank* v. *Opperman*, 39 S. Ct. 330, 249 U.S. 448, 63 L. Ed. 701.

2. The Asserted Federal Constitutional Questions Were Neither Timely Nor Properly Raised in the Trial Court or in the Mississippi Supreme Court, nor Expressly Passed on.

Prior to the judgment of the Mississippi Supreme Court rendered on July 3, 1972, the petitioner did not raise any federal constitutional questions, either in its amended complaint, in the trial court or in the Mississippi Supreme Court. The petitioner's assignments of error in the Mississippi Supreme Court raised none of the federal constitutional questions now asserted by petitioner. The asserted federal questions were not raised on the petition for a rehearing, overruled by the Mississippi Supreme Court on January 2, 1973.

The opinion of the trial court, Appendix "A", page A1 hereof, the opinion of the Mississippi Supreme Court, Appendix "A", page A1 of the petition, and the dissenting opinion on rehearing, Appendix "B", page A11 of the petition, dealt solely with questions of state law. The Mississippi Supreme Court in overruling the petitioner's motion in arrest of judgment rendered no opinion thereon.

The Mississippi Supreme Court on a petition for rehearing will not consider any point not assigned as error on the original presentation of the case on the original appeal. *Frady* v. *Bryan*, 48 So. 2d 611 (Miss 1950).

Under Mississippi law the Mississippi Supreme Court will not consider or pass upon constitutional questions not raised in the trial court. *Stewart* v. *City of Pascagoula*,

206 So. 2d 325 (Miss 1968); *State ex rel. Carr* v. *Cabana Terrace, Inc.*, 153 So. 2d 257 (Miss 1963).

This rule applies to bills to quiet and confirm title. *Comfort* v. *Landrum*, 52 So. 2d 658 (Miss 1951).

The certificate of the Chief Justice of the Mississippi Supreme Court, Petition Appendix "E", page A21, that in the consideration of the motion in arrest of judgment the Court "entertained the said motion on its merits as a motion for rehearing and debated and determined the jurisdictional and constitutional questions raised in said motion" must be viewed and construed in the light of applicable Mississippi law.

The certificate of the Chief Justice is not controlling, and cannot avail to foreclose inquiry by this Court as to whether federal questions were properly raised and presented in the Court below. *Honeyman* v. *Hanan*, (1937) 57 S. Ct. 350, 300 U.S. 14, 81 L. Ed. 476, appeal dismissed 58 S. Ct. 273, 302 U.S. 375, 82 L. Ed. 312. *Powell* v. *Brunswick County, Va.*, (1893) 14 S. Ct. 166, 150 U.S. 433, 37 L. Ed. 1134.

This Court has consistently ruled that before its jurisdiction can be invoked on certiorari from a state court, it must appear that the federal questions involved were raised in the state courts at the proper time: *Hulbert* v. *Chicago*, 26 S. Ct. 617, 202 U.S. 275, 50 L. Ed. 1026 (1906); *Brown* v. *Commonwealth of Mass.*, 12 S. Ct. 757, 144 U.S. 573, 36 L. Ed. 546 (1892); *Pennsylvania R. Co.* v. *Illinois Brick Co.*, (1936) 56 S. Ct. 556, 297 U.S 447, 80 L. Ed. 796.

The Mississippi Supreme Court on a second petition for rehearing will only consider jurisdictional questions. Petitioner's attempt to raise federal constitutional questions in a motion to arrest the judgment after judgment was,

we submit, improper: *Sayward* v. *Denny*, 158 U.S. 180, 15 S. Ct. 777, 39 L. Ed. 941 (1895). In any event, the motion was denied without opinion: *Bailey* v. *Anderson*, 66 S. Ct. 66, 326 U.S. 203, 90 L. Ed. 3 (1945), rehearing denied 66 S. Ct. 228, 326 U.S. 691, 90 L. Ed. 407; *Street* v. *New York*, 89 S. Ct. 1354, 394 U.S. 576, 22 L. Ed. 572; *Carter* v. *Berry*, 142 So. 2d 13, 95 ALR 2d 791 (Miss 1962).

3. The Asserted Federal Constitutional Questions Do Not Raise Any Substantial Federal Question.

The jurisdictional statement of petitioner presents no substantial federal question. The contention of the petitioner that the judicial decision of the Mississippi Supreme Court holding that the State land patents under which petitioner claims fee simple title to state trust tidelands were void under Mississippi law, impairs the obligations of its patents as contract, invoking Article 1, §10, cl. 1 of the Federal Constitution, has been repeatedly rejected by this court. *Barrows* v. *Jackson*, 73 S. Ct. 1031, 346 U.S. 249, 97 L. Ed. 1586, rehearing denied 74 S. Ct 19, 346 U.S. 841, 98 L. Ed. 361; *Fleming* v. *Fleming*, 44 S. Ct. 246, 264 U.S. 29, 68 L. Ed. 547; *Tidal Oil Company, et al.* v. *Flanagan*, 263 U.S. 444, 44 S. Ct. 197, 68 L. Ed. 382; *Mississippi and Missouri R. Co.* v. *McClure*, 26 Iowa 243, appeal dismissed 77 U.S. 511, 10 Wall. 511, 19 L. Ed. 997.

In *Fleming* v. *Fleming*, supra, petitioner's argument of legislation by judicial interpretation was advanced in the state court in the same manner, that is on an application for a second rehearing. This Court in dismissing said that such an argument is "ingenuous but unsound." [*Fleming* v. *Fleming*, supra, p. 247]

The same contention, invoking the due process clause of the 14th Article of Amendment to the Federal Constitu-

tion has likewise been rejected by this Court. *Fox River Paper Co.* v. *Railroad Commission of Wisconsin*, 47 S. Ct. 669, 274 U.S. 561, 71 L. Ed. 1279; *Tracy* v. *Ginzberg*, (1907) 27 S. Ct. 461, 205 U.S. 170, 51 L. Ed. 755. In the latter case this Court aptly said:

> "The 14th Amendment did not impair the authority of the states, by their judicial tribunals, and according to their settled usages and established modes of procedure, to determine finally, for the parties before them controverted questions as to the ownership of property, which did not involve any right secured by the federal constitution, or by any valid act of Congress, or by any treaty."

4. The Judgment of the Mississippi Supreme Court Rests on an Adequate Non-Federal Basis.

Property rights in Mississippi's public trust tidelands are a matter of state law. *Shively* v. *Bowlby*, 152 U.S. 1, 14 S. Ct. 548, 38 L. Ed. 331 (1894); *Fox River Paper Co.* v. *Railroad Commission of Wisconsin*, supra. The petition does not deny paramount state authority in this field.

Mississippi's public trust doctrine as to the ownership and control of its tidelands is predicated on and follows the holdings of this Court in *Illinois Central Railroad* v. *Illinois*, 13 S. Ct. 110, 146 U.S. 387, 36 L. Ed. 1018. The Mississippi Supreme Court has repeatedly cited this case with approval. *Money* v. *Wood*, 118 So. 357 (Miss 1928); *State* v. *Stewart*, 184 So. 44 (Miss 1938); *Pace* v. *State*, 4 So. 2d 270 (Miss 1941).

Appellant's statement that Appleby v. New York, 271 U.S. 364, 70 L. Ed. 992 is controlling is not supported by the facts and the law in that case. In Appleby this Court clearly and carefully distinguished the facts and applicable law from its previous decision in *Illinois Central*

Railroad Co. v. *Illinois*, supra, relative to the attempted sale by the State of Illinois of one square mile of the bed of Lake Michigan.

The *Illinois Central Railroad* case decided by this Court, and the case at bar as decided by the Mississippi Court, are factually and doctrinally controlling. In the former case one square mile and 1,000 acres of tidelands in the bed of Lake Michigan were involved. In this case twenty square miles and 20,000 acres of tidelands in the bed of the Pascagoula Bay are involved, 5,000 acres of which are claimed by the petitioner.

Petitioner argues that the Mississippi Supreme Court has retroactively established a new rule of law and property rights in its tidelands by its decision in the case at bar, and that this justifies federal intervention, citing *Martin* v. *O'Brien*, 34 Miss 21 (Miss 1857). That case did not even inferentially pass upon the authority of the state legislature, under the 1884 act (Appendix "B" page A4 hereto), to direct the survey of the Bay of Pascagoula, and to authorize the sale of the public trust tidal areas in such bay to private persons for private purposes. The 1857 case involved the right of a town acting under a state statute to grant a permit to a private company for the construction of a public wharf on the *public* trust tidelands. The Mississippi Supreme Court held that this being *for a public purpose* there was no violation of the public trust purposes. (emphasis added)

As pointed out by the controlling opinion of the Mississippi Supreme Court, the statute under which petitioner asserts its tidelands claims was *initally* considered in *Money* v. *Wood*, supra. (emphasis added) The rule of law and property announced in *Money* v. *Wood*, supra, has been consistently followed by the Mississippi Supreme Court.

The contention of the petitioner that tidal marsh islands cannot be held to be subject to the public trust doctrine has been rejected by this Court.

In *Shively* v. *Bowlby*, supra, this Court said:

> "Lands under tide waters are incapable of cultivation or improvement in the manner of lands above high water mark. They are of great value to the public for the purposes of commerce, navigation and fishing. Their improvement by individuals, when permitted, is incidental or subordinate to the public use and right. Therefore, the title and control of them are vested in the sovereign for the benefit of the whole people."

Tidal marsh islands, sand bars, and mud flats of navigable waters are subject to the public trust doctrine. *Baer* v. *Moran Brothers Company*, 14 S. Ct. 823, 153 U.S. 287 (1894), 38 L. Ed. 718. *United States* v. *Turner*, 175 F. 2d 644, 647 (Fifth Circuit 1949), 338 U.S. 851, 70 S. Ct. 92, 94 L. Ed. 521.

Mississippi's interests in these tidal areas are not asserted in a proprietary capacity, but in its right of sovereignty and as the trustee for public rights in such areas. The doctrine is one of common law origin, but is held to be an inherent duty and obligation of the state in the exercise of its sovereignty.

The assertion that such sovereign rights can be lost to the people of the state because of the unauthorized acts of public officials of the state is the same thesis rejected by this Court in *Illinois Central Railroad Co.* v. *Illinois*, supra, and in *United States* v. *California*, 332 U.S. 19, 91 L. Ed. 1889, 67 S. Ct. 1658.

In the latter case this Court aptly stated:

"And even assuming that Government agencies have been negligent in failing to recognize or assert the claims of the Government at an earlier date, the great interests of the Government in this ocean area are not to be forfeited as a result. The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act."

CONCLUSION

We respectfully submit that the petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX "A"

IN THE CHANCERY COURT MARCH TERM, 1971
STATE OF MISSISSIPPI COUNTY OF JACKSON

No. 22,353

INTERNATIONAL PAPER COMPANY
Complainant

VS.

STATE OF MISSISSIPPI, ET AL.
Defendants

Opinion on Sustaining Demurrer

(Filed March 30, 1971)

The Court has heard the argument of counsel and extensive briefs filed in the matter, carefully examined the exhibits to the Bill and other muniments of title referred to in the deraignment set forth in the Bill of Complaint and it is the opinion of the Court that the face of the pleadings show that these lands were below mean high tide at the time of the admission of Mississippi to the Union as shown by the United States Government Land Office plat and survey and therefore title to said lands passed to the State of Mississippi as part of the territorial waters thereof under the Act of Admission of Mississippi to the Union.

The Bill goes on to state that at the time of Admission it was under tide water and that later because of accretion it built up to above tide level. It shows further that it lies wholly between the East and West Pascagoula Rivers and is not adjacent to fast land on either bank of the rivers.

The pleadings further show that back in 1884 the Legislature passed an Act to have the land surveyed and sold and the Bill attaches a copy of the surveyor's report and plat made subsequent to said Act and then shows patents issued to various individuals which patents are referred to in the chain of title in the Bill by book and page and from these original patentees came down to the present complainant, International Paper Company, who seeks to confirm the title or rather remove a cloud when the State Highway Department threatens to build a bridge or causeway across it for highway purposes.

It is the opinion of the Court that when these lands came to the State of Mississippi as submerged lands that the State of Mississippi became the owner thereof as Trustee for the people of the State and subject only to the paramount right of the United States to control commerce and navigation.

That the ownership of the State was and is as Trustee for the use and benefit of all people of the State and it is not subject to conveyance to private individuals for private purposes. Yet the thrust of the Bill of Complaint is that the conveyances were made to private individuals for private purposes.

The Woods case and the Saucier cases seem to have put the matter to rest but the recent Truting case is used by complainant as an argument contrary to the former holdings. However the Truting case was under a special act of the Legislature declared to be in its overall effect for the use and benefit of the public and we do not think that this case helps the present situation.

It is our view that the General Demurrer should be sustained.

This obviates the necessity of ruling on the special demurrers at this time but it is the opinion of the Court that the Attorney General of the State of Mississippi for and on behalf of the State of Mississippi should be made a party to the suit rather than have it limited merely to the State Highway Commission. We do not feel that the other grounds of special demurrer are well taken for the reason that none of these bodies are given control over the actual lands but are given eminent domain powers if they need to take any land.

A lengthy discussion of the authorities at this time seems needless. It is sufficient to say that the Court has carefully considered the authorities and the discussion of the same in the briefs of the respective parties.

This 29th day of March, 1971.

/s/ L. C. Corban
Chancellor

APPENDIX "B"

Chapter XVII, Mississippi Laws of 1884

AN ACT authorizing the Survey and Sale of certain Marsh Lands belonging to the State of Mississippi, lying on the banks of the East and West Pascagoula and Pearl Rivers, and other Streams navigable and unnavigable flowing into the Mississippi Sound, and the Lakes bordering thereon.

SECTION 1. BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI, That the survey of all the tidal overflowed marsh lands subject to overflow, lying on the banks of East and West Pascagoula River and Pearl River, and all other rivers emptying into the Mississippi Sound and Gulf of Mexico, and all tidal lands subject o overflow in or upon any island, or islands subject to entry, lying within the waters of the Gulf of Mexico, or Mississippi Sound, and the rivers or tributaries emptying therein, shall be made by the Commissioner of Swamp Lands, upon the recommendation of the Governor, with the concurrence of the Attorney-General and Secretary of State, at as early a date as practicable. That so soon as said lands are properly classified, surveyed, and the field notes, plats and the diagrams deposited in the proper office in Jackson, that they shall be sold in such manner, and at such time, and for such price, by the Commissioner of Swamp Lands, as the Governor, Attorney General and Secretary of State shall designate; provided, that parties having made any permanent improvement to the value of one hundred and fifty dollars upon any lands so surveyed and to be sold, shall be entitled to the preference in entering the same, at the price to be designated as aforesaid; provided, he or they shall

within thirty days after said lands are properly listed and offered for sale, forward to the Commissioner of Swamp Lands the amount in cash necessary to purchase such lands as he or they propose to purchase.

SECTION 2. Be it further enacted. That all lands surveyed and listed under the provisions of this act shall be entered in the office of the Commissioner of Swamp Lands, who shall hereafter be Surveyor General of "Gulf Coast Lands" and all accounts and monies derived from the sale of these lands shall be so kept as to show from what source obtained. The Commissioner in his report of survey shall give an accurate description of the land, and a description and estimated values of improvements, if any thereon.

SECTION 3. Be it further enacted, That all laws in force regulating the sale of swamp lands in this State shall be applicable to the sale of "Gulf Coast Lands."

Section 4. Be it further enacted. That this act take effect and be in force from and after its passage.

Approved, March 15, 1884.

APPENDIX "C"

Section 4142, Mississippi Code of 1942

Section 4142. Failure of title to public lands.

If the title to any public land sold by the state through the auditor or land office, or by any municipality shall fail, or shall have failed, the state or such municipality, as the case may be, shall refund the purchase-money to its vendee or his heirs or assigns, and if no profits have been received from said lands, then all taxes shall be returned also, and all fees paid, with interest as six per centum per annum; but except as hereinabove provided, the question of failure of title can only be determined, in a suit filed in the county in which the land is situated, and the land commissioner or the municipality, as the case may be, shall be made a party to every such suit; but where such failure of title shall have been caused by the cancellation of a patent issued by the state, or a deed from the municipality, and such cancellation has been made under the requirements of any law or decree of a chancery court of this state, directing cancellation in favor of prior purchasers, or through the failure of the state's title, or the title of the municipality, as the case may be, the failure of title so caused shall not be required to be determined by decree of court.